

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**

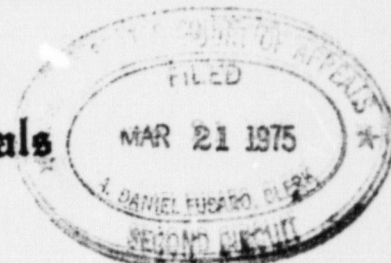




# 75-7006

## ORIGINAL

In The  
**United States Court of Appeals**  
For The Second Circuit



DAVID STIRLING, JR. and WILLIAM G. STIRLING,

*Plaintiffs-Appellants,*

vs.

CHEMICAL BANK, individually, and as Agent; THE CHASE MANHATTAN BANK, N.A.; MARINE MIDLAND BANK-WESTERN; MARINE MIDLAND BANK-ROCHESTER; LINCOLN FIRST BANK OF ROCHESTER (formerly LINCOLN ROCHESTER TRUST COMPANY); UNION COMMERCE BANK, FRANK BEATTY; JOHN J. IRISH; PAAVO PRIMA; "RICHARD ROE"; "MICHAEL ROE"; "MARTIN ROE"; "ALPHONSE ROE"; and "BILL ROE"; (quoted names fictitious, true names being unknown, the parties intended being officers and/or employees of the respectively named defendant banks, as co-conspirators, along with other co-conspirators, not herein named),

*Defendants-Appellees.*

### APPENDIX FOR PLAINTIFFS-APPELLANTS

FELDSHUH, WEINBERGER & DERFNER  
*Attorneys for Plaintiffs-Appellants*  
144 East 44th Street  
New York, New York 10017  
(212) 687-8930

(8206)

LUTZ APPELLATE PRINTERS, INC.  
Law and Financial Printing

South River, N. J.  
(201) 257-6850

New York, N. Y.  
(212) 565-6377

Philadelphia, Pa.  
(215) 563-5587

Washington, D. C.  
(202) 783-7288

DD  
P/S

2

PAGINATION AS IN ORIGINAL COPY



## TABLE OF CONTENTS

|  | Page |
|--|------|
| Docket Entries . . . . .   | 1a   |
| Amended Complaint (Filed December 6,<br>1972) . . . . .  | 6a   |
| Defendants' Motions to Dismiss the<br>Amended Complaint Arranged in the<br>Order in Which the Defendants' Appear<br>in Caption . . . . . | 28a  |
| Opinion of the District Court (Filed Sept-<br>ember 30, 1974) . . . . .  | 42a  |
| Order and Judgment of the District Court<br>(Filed November 8, 1974) . . . . .   | 48a  |
| Notice of Appeal (Filed December 19, 1974) . .   | 55a  |

CIVIL DOCKET  
UNITED STATES DISTRICT COURT

DOCKET ENTRIES

JUDG. *[illegible]*  
la

Jury demand date:  
12/6/72 by Plaintiff.

72 NOV 17 1976

D. C. Form No. 106 Rev.

TITLE OF CASE

ATTORNEYS

DAVID STIRLING, JR.  
WILLIAM G. STIRLING

For plaintiff:

FELDSHUH & FRANK  
144 East 44th St. 10017 MU 7-793

VS

~~CHEMICAL BANK, FIRST NATIONAL STATE BANK~~  
~~(OF NEW JERSEY)~~  
~~FRANK BEATTY~~  
~~JOHN H. IRISH~~  
~~JOHN DOE and RICHARD DOE, such names being~~  
~~fictitious, the parties intended being~~  
~~co-conspirators with other named defendants~~

amended 12-6-72

CHEMICAL BANK, individually, and as Agent;  
THE CHASE MANHATTAN BANK, N.A.;  
MARINE MIDLAND BANK-WESTERN;  
LINCOLN FIRST BANK OF ROCHESTER (formerly  
Lincoln Rochester Trust Co);  
UNION COMMERCE BANK, FRANK BEATTY;  
JOHN J. IRISH;  
PAAVO PRIMA;  
"RICHARD ROE";  
"MICHAEL ROE";  
"MARTIN ROE";  
"ALPHONSE ROE";  
and "BILL ROE";

(quoted names fictitious, true names  
being unknown, the parties intended  
being officers and/or employees of  
the respectively named debt banks, as  
co-conspirators, along with other co-  
conspirators, not herein named.).

For defendant:

NIXON, HARGRAVE, DEVANS & DOYLE  
One Exchange St. N.Y.C. 14603 546-  
for Lincoln First Bank of Rochester  
Milbank, Tweed, Hadley & McCloy (for The Chase  
Manhattan Bank, N.A.) One Chase Manhattan  
NY 10005 422-2660

Cravath, Swaine & Moore (for PAAVO PRIMA)  
One Chase Manhattan Plaza, NY 10005  
HA 2-3000

| STATISTICAL RECORD | COSTS        | DATE     | NAME OR RECEIPT NO. | REC. | DISB. |
|--------------------|--------------|----------|---------------------|------|-------|
| J.S. 5 mailed x    | Clerk        | 10/20/72 | Feldshuh, L.H. Jr.  | NI   |       |
| J.S. 6 mailed      | Marshal      | 10/24/72 | USCA                |      | 10    |
| Basis of Action:   | Docket fee   | 11/14/72 | Feldshuh            |      |       |
| L.E.C. ACT OF 1934 | Witness fees | 11/17/72 | Thorn               |      |       |
| Action arose at:   | Depositions  |          |                     |      |       |



DATE

**ONLY COPY AVAILABLE**

PAGE 2

Date Order or  
Judgment Note

ct.20-72 Filed complaint and issued summons

Nov. 2-72 Filed motion to dismiss as to deft. First Natl. State Bank of New Jersey

Nov. 1-72 Filed summons with marshal's ret. Served First Natl. State Bank of New Jersey on 10/24/72.

Nov. 1-72 Filed summons with marshal's ret. Served Chemical Bank by Mr. Smith on 10/10/72

Nov. 1-72 Filed motion to dismiss as to deft. Chemical Bank on 10/10/72. So ordered. Bonsal, J.

Nov. 20-72 Filed motion on notice papers filed 11/2/72. Motion to dismiss as to defendant First National State Bank of New Jersey for improper venue is granted after argument. SETTLE ORDER ON NOTICE. Bonsal, J.

Nov. 28-72 Filed Consent Order granting motion to dismiss as to deft. First National State Bank of New Jersey. Ordered that plaintiff's complaint is dismissed as to deft. First National State Bank of New Jersey on the ground that venue is improperly laid in the LBNY. Bonsal, J. (mailed notice).

Dec. 6-72 Filed AMENDED COMPLAINT, and jury demand.

Dec. 19-72 Filed deft Chemical Bank's notice of motion Re: dismiss amended complaint, ret. 1-15-73.

Dec. 19-72 Filed memorandum of law in support of motion dtd this date.

Dec. 20-72 Filed Amended Summons and entered marshal's return served on:  
Paavo Prima, Esq. by Mrs. Smith on 12-7-72,  
Chase Manhattan Bank by Mr. Decant on 12-7-72,  
Richard Roe by Mr. Decant on 12-7-72,  
Marine Midland Bank-Western by E.W. Hartung on 12-7-72,  
Michael Roe by E.W. Hartung on 12-7-72,  
Marine Midland Bank Rochester by M. Clifford Nelson on 12-12-72,  
Martin Roe by N. Clifford Nelson on 12-12-72,  
Lincoln First Bank of Rochester by Chester Dan on 12-12-72,  
Alphonse Roe by Chester Dann on 12-12-72,  
Union Commerce Bank by Charles A. Baker on 12-8-72 &  
Bill Roe by Charles A. Baker on 12-8-72.

Dec. 21-72 Filed Stip and Order that the time for deft The Chase Manhattan Bank to answer the amended complaint is extended from 12-27-72 to 1-26-73. BONSAL, J.

Dec. 20-72 Filed Stip and Order that the time for def to answer is extended from 12-28-72 to 1-13-73. BONSAL, J.

Jan. 5-73 Filed defts Marine Midland Bank-Western and Marine Midland Bank-Rochester's notice of motion Re: dismiss amended complaint.

Jan. 8-73 Filed memorandum of law in support of motion dtd this date for dismissal of the amended complaint.

Jan. 8-73 Filed deft Linclon First Bank of Rochester's appearance and designation of atty per to Gen. Rule 4.

Jan. 5-73 Filed Stip and Order that the time for defts Marine Bank Western and Marine Midland Bank-Rochester to answer the complaint is extended and adj'd from 12-27-72 to 1-15-73. BONSAL, J.

Jan. 8-73 Filed stipulation and order extending deft. Lincoln First Bank of Rochester's time to answer complaint to and including a date twenty days after service of notice of entry of an order pur. to Civil Rule 11A(c) determining whether or not this action may be maintained as a class action. So ordered. Bonsal, J.

Jan. 15-73 Filed stipulation and order adjourning motion to dismiss complaint, now ret. 1/15/73 to 2/26/73. So ordered. Bonsal, J. defts. Marine Midland Bank - Western and Marine Midland Bank - Rochester.

Jan. 15-73 Filed stipulation and order adjourning motion of deft. Chemical Bank to dismiss complaint now ret. 1/15/73 to 2/26/73. So ordered. Bonsal, J.

Jan. 29-73 Filed Notice of Motion re: dismiss complaint Ret. 3/12/73 at 9:30 A.M. before Bonsal, J.

Jan. 29-73 Filed Memorandum of deft. The Chase Manhattan Bank, NA in support of motion to dismiss.

continued next page 3

| DATE       | FILINGS-PROCEEDING   | JUDGE BUNSON |           | CLERK'S FEES | AMOUNT REPORTED IN EMOLUMENT RETURN |
|------------|--|--------------|-----------|--------------|-------------------------------------|
|            |  | PLAINTIFF    | DEFENDANT |              |                                     |
| Feb. 13-73 | Filed brief in support of motion on behalf of David Stirling, Jr. and William Stirling, for consolidation and transfer to the SDNY.  |              |           |              |                                     |
| Feb. 13-73 | Filed Notice of Motion Ret. 3/12/73 at 9:30 AM in ROOM 129 re: dismiss amended complaint as to deft. Union Commerce Bank.  |              |           |              |                                     |
| Feb. 13-73 | Filed Memorandum of deft. Union Commerce Bank in support of motion to dismiss.   |              |           |              |                                     |
| Feb. 13-73 | Filed Notice of Motion re: dismiss (for Paavo Prima)   |              |           |              | COM                                 |
| Feb. 15-73 | Filed Memorandum of Paavo Prima in support of motion to dismiss.   |              |           |              |                                     |
| Feb. 16-73 | Filed additional summons.  |              |           |              |                                     |
| Feb. 14-73 | Filed additional summons with marshal's ret. Served Paavo Prima on 2/7/73.   |              |           |              |                                     |
| Mar. 1-73  | Filed Notice of Motion Ret. 3/6/73 at 10:30 AM re: extend to answer motions to dismiss. (now ret. 3/12/73)   |              |           |              |                                     |
| Mar. 7-73  | Filed MEMO End. on motion Filed Mar. 1, 73; Re: extend to answer motions to dismiss. Motion denied. etc. So Ordered. WARD, J. (n/M)  |              |           |              |                                     |
| Mar. 13-73 | Filed notice of motion, ret. Mar. 19, 73, at 9:30 a.m. Room 129, Re: extending time to answer amended comp.  |              |           |              |                                     |
| Mar. 15-73 | Filed additional summons with marshal's ret. Served: John J. Irish on 3/6/73.<br>Frank Beattie - unable to serve - retired.  |              |           |              |                                     |
| Mar. 19-73 | Filed MEMO ENDORSED on motion extending pltf. time to answer various motion to dismiss; Motion granted - No opposition. Settle Order on Notice. BONSAL, J.                           |              |           |              |                                     |
| Mar. 22-73 | Filed Notice of Motion re: Intervene as parties plaintiff Ret. as soon as counsel can be heard. (before Bonsal).   |              |           |              |                                     |
| Apr. 2-73  | Filed Stip and order extending John J. Irish time to answer until 4/26/73. BONSAL, J.  |              |           |              |                                     |
| May 8-73   | Filed Stip and order extending time for John J. Irish to answer; including 30 days after a copy of the order of Judicial Panel on Multidistrict Litigation determination. BONSAL, J. |              |           |              |                                     |
| Feb. 28-74 | Filed Bank deft's memorandum of Issues to be covered at pre-trial conference.  |              |           |              |                                     |
| Apr. 15-74 | Filed deft's Lincoln First Bank of Rochester notice of motion, to dismiss the first cause of action alleged in the amended, complaint ret. 6-10-74.                                  |              |           |              |                                     |
| Apr. 15-74 | Filed deft's Lincoln First Bank of Rochester Memorandum in support of motion to dismiss.   |              |           |              |                                     |
| Apr. 16-74 | Filed deft's (Frank Beattie & John J. Irish affidavit & notice, of motion for judgment ret. 6-10-74.   |              |           |              |                                     |
| Apr. 16-74 | Filed deft's memorandum in support of their motion ret. 6-10-74.   |              |           |              |                                     |



| DATE      | FILINGS-PROCEEDINGS  | CLERK'S FEE |           | AMOUNT<br>REPORTED IN<br>EMOLUMENT<br>RETURNS |
|-----------|--|-------------|-----------|---|
|           |  | PLAINTIFF   | DEFENDANT |   |
| May 10/74 | Filed memo of law of Chemical Bank.  |             |           |   |
| May 16-74 | Filed Pltffs' Memorandum in opposition to dismissal.   |             |           |   |
| June 5-74 | Filed reply memorandum of chemical bank in support of motion to dismiss.   |             |           |   |
| June-4-74 | Filed Memo-Endorsed on Applicants for Intervention filed 3-22-73:<br>Motion to intervene denied after argument without prejudice to,<br>Renewal following determination of motion to dismiss. So ordered.<br>Bonsal J. m/n   |             |           |   |
| June-4-74 | Filed deft's Chase Manhattan Bank reply memorandum in support of deft's<br>motion to dismiss.  |             |           |   |
| June.6-74 | Filed reply memorandum of deft's Union Commerce Bank & Union Planters,<br>National Bank in support of their motions to dismiss complaints.   |             |           |   |
| 7-12/74   | Filed transcript of record of proceedings, date 3/12/74  |             |           |   |
| 7-16/74   | Filed transcript of record of proceedings, dated 6-10-74   |             |           |   |
| Op.30-74  | Filed Opinion #41240: Deft's motions to dismiss the amended complaint<br>in Stirling V. Chemical Bank, etal & the complaints in Stirling V.<br>First National State Bank of New Jersey, etal. & Stirling V.<br>Union Planters National Bank, etal are granted. The motions of<br>deft's First National State Bank of New Jersey & Union Planter<br>Bank are granted with leave to plttf's to file amended complaint<br>with respect to the first cause of action within twenty days of<br>date of the order to be entered herein. The motion of Union<br>Bank is granted without prejudice to plttf's instituting a new<br>action against said bank, if they are so advised. Plttf's motion<br>for an order granting them leave to reargue or certifying judgment<br>order for appeal is denied. Settle orders on notice. Bonsal, J. |             |           |   |
| Nov.8-74  | Filed Order & Judgment: Ordered that action is dismissed as against<br>all deft's with prejudice. Bonsal, J. Judgment Ent. Clerk<br>Ent. 11-13-74. m/n   |             |           |   |
| Dec.2-74  | Filed plttf's affidavit & notice of motion to alter or amend order<br>ret. 12-9-74.  |             |           |   |
| Dec.5-74  | Filed affidavit of B.J. Bonn, III in opposition to plttf's motion.   |             |           |   |
| Dec.10-74 | Filed memo-endorsed on plttf's motion filed 12-2-74: Motion denied<br>after argument. So ordered. Bonsal, J.   |             |           |   |
| Dec.19-74 | Filed plttf's notice of appeal from order of 11-8-74. Mailed notice<br>Gravath, Swaine & Moore, Milbank, Twee, Hadley & McCloy<br>Bleakley, Platt, Nixon, Hargrave-Debevoise, Plimpton & Townley, Dallas   |             |           |   |
| Jan.21-75 | Filed notice that record on appeal has been certified & transferred to<br>the USCA on this 21st. day of Jan. 1975.   |             |           |   |

CIVIL DOCKET David Stirling, Jr. et. ano. -vs- Chemical Bank, etc. et. al.

D. C. 110

RAYMOND F. BURCHARDT, Clerk

BY

Deputy Clerk



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

DAVID STIRLING, JR. and  
WILLIAM G. STIRLING,

Plaintiffs,

-against-

CLASS ACTION -  
-AMENDED COMPLAINT-

CHEMICAL BANK, individually,  
and as Agent; THE CHASE MANHAT-  
TAN BANK, N. A.; MARINE MIDLAND  
BANK - WESTERN: MARINE MIDLAND  
BANK - ROCHESTER: LINCOLN FIRST  
BANK OF ROCHESTER (formerly  
LINCOLN ROCHESTER TRUST COMPANY);  
UNION COMMERCE BANK, FRANK BEATTY;  
JOHN J. IRISH; PAAVO PRIMA;  
"RICHARD ROE"; "MICHAEL ROE";  
"MARTIN ROE"; "ALPHONSE ROE"; and  
"BILL ROE", (quoted names ficti-  
tious, true names being unknown,  
the parties intended being officers  
and/or employees of the respectively  
named defendant banks, as co-  
conspirators, along with other co-  
conspirators, not herein named),

PLAINTIFFS DEMAND  
TRIAL BY JURY

72 Civ 4476  
(D.B.B.)

Defendants.

----- x

Plaintiffs allege:

AS TO ALL CAUSES OF ACTION, UNLESS  
OTHERWISE ALLEGED:

1. (a) Plaintiffs are residents of the State  
of New York.

(b) The defendant Chemical Bank is a New  
York State chartered banking corporation, having its  
principal office at 20 Pine Street, New York, New York.

(c) The defendant Chase Manhattan Bank,  
N. A., is a national bank, having its principal office

(d) The defendant Marine Midland Bank - Western is a New York State chartered banking corporation, having its principal office at 237 Main Street, Buffalo, New York.

(e) The defendant Marine Midland Bank - Rochester, is a New York State chartered banking corporation, having its principal office at One Marine Midland Plaza, Rochester, New York.

(f) The defendant Lincoln First Bank of Rochester (formerly Lincoln Rochester Trust Company) is a New York State chartered banking corporation, having its principal office at 183 Main Street East, Rochester, New York.

(g) The defendant Union Commerce Bank is a banking corporation, chartered under the laws of the State of Ohio, and having its principal office at 917 Euclid Avenue, Cleveland, Ohio.

(h) At all the times herein mentioned, the individual defendants, John J. Irish, Frank Beatty, Paavo Prima, officers and/or employees of Chemical Bank, "Richard Roe", "Michael Roe", "Martin Roe", "Alphonse Roe" and "Bill Roe" (quoted names fictitious, true names unknown to plaintiffs, the parties intended being officers and/or employees of the other defendant banks herein), were co-conspirators, who, together with the other named defendants, plus other co-conspirators not herein named, engaged in the acts herein-after alleged.

2. (a) All named corporate defendants herein,



along with other co-conspirator banks (through their officers and/or employees) not herein named, acted as principals in the plan and scheme of conspiracy alleged herein, and the defendant Chemical Bank also acted as a limited Agent for the other corporate defendants herein, in the scheme and conspiracy alleged herein, pursuant to the terms of a certain Revolving Credit Agreement ("Agreement").

(b) The acts of all the corporate defendants herein alleged in connection with said Agreement constitutes the transaction of business in the State of New York, and, more particularly, in the Southern and Western Districts of the State of New York.

(c) At all times herein alleged, with the exception of the defendant Union Commerce Bank, all the corporate defendants named herein were doing business within the State of New York.

3. (a) This Court has jurisdiction as to the First Cause of Action herein alleged, under the principle of pendent jurisdiction; §§ 301 and 302 of the N. Y. Civil Practice Law and Rules (McKinney's Consol. Laws of N. Y.) and as to such cause of action, the venue is proper under § 28 U.S.C. § 1391(b), § 1392(a) and § 94 of the National Banking Act, 12 U.S.C. § 94.

(b) The jurisdiction of the Court as to the Second and Third Causes of Action herein is based upon § 27 of the Securities Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78(aa), as amended, in that the claims alleged herein in the said Causes of Action, arise under the Securities Act and the Rules and Regulations of the Securities and

Exchange Commission promulgated thereunder, including, without limitation, §§ 10, 13, 16, 18, 20 and 32 of the Exchange Act (15 U.S.C. §§ 78(j), 78(m), 78(p), 78(r), 78(t) and 78(ff) respectively).

(c) The illegal acts complained of herein, occurred, in substantial part, in the Southern and Western Districts of the State of New York.

(d) All of the corporate defendants and co-conspirators herein, along with other co-conspirator banking corporations not specifically named herein, are parties to the aforesaid Revolving Credit Agreement. Section 10.05 of said Agreement provides for the application of the Laws of the State of New York for the construction of said Agreement, and other, therein specified documents, relevant to the resolution of the matters herein.

4. STIRLING HOMEX CORPORATION ("Stirling Homex") was and is a public Delaware corporation, with its principal office in Avon, New York, and up to on or about June 1, 1972 maintained offices in New York, New York, and was engaged in the business of furnishing housing upon an expedited basis to governmental authorities and agencies devoted to furnishing housing and dwelling units pursuant to various federal, state and local laws, to non-profit sponsors of such housing, and to private investors. The said business includes site examination, acquisition of the site, preparation and submission of proposals by Stirling Homex to furnish such housing through in-plant manufacture of modules and selling and installing the same.

5. Class Action Allegations

(a) A Class Action is alleged pursuant to



(b) The Class consists of all persons who owned, purchased or sold securities of Stirling Homex between March 11th, 1972 and July 10th, 1972, during which period the defendant banks and their officers, servants and employees, being the named individual defendants joined together, conspired and agreed falsely, together with other co-conspirator banks, to effect the plan and scheme hereinafter alleged, the object of which was, amongst other things, to gain control of Stirling Homex, and to elevate their positions from that of unsecured creditors to secured creditors, possessed of liens covering all of the assets of Stirling Homex, and thereby freezing out all other creditors as well as the preferred and common stockholders of Stirling Homex, and further, during which period the prices of the common stock and preferred stock of Stirling Homex were caused to be artificially manipulated and pegged by reason of the fraudulent misrepresentations and breaches of promises of the defendants and other co-conspirators as hereinafter more particularly alleged.

(c) During this time, Stirling Homex had, and still has approximately 8,900,000 common shares and 500,000 \$2.40 cumulative convertible preferred shares outstanding. Stirling Homex's common stock and preferred stock are widely held by many thousands of shareholders throughout the country, and plaintiffs each own approximately 1,800,000 shares of Common Stock of Stirling Homex. The Class consists of many thousands of persons damaged by the fraudulent misrepresentations, schemes and plan, and breaches of promises by the defendants, and by reason

thereof plaintiffs alone sustained damages each in the sum of approximately \$35,000,000 when the market price of such shares plunged.

(d) Plaintiffs are members of said Class; their claims are typical of the claims of all Class members, and they and their counsel will fairly and adequately protect the interests of said Class.

(e) The questions of law and fact common to the Class are: The duties owed by defendants to refrain from engaging in a plan and scheme, along with other co-conspirators, whereby the defendant banks herein, along with other co-conspirators, would acquire falsely and fraudulently a position as secured creditors over and above all other creditors and stockholders of Stirling Homex, and the duty to refrain from manipulating and pegging the price of Stirling Homex's common stock, and from omitting to disclose to the stockholders their plan and scheme to freeze out not only unsecured creditors, but also all stockholders from in any way sharing in the assets of Stirling Homex in the event of insolvency or otherwise.

(f) The questions of law and fact common to the members of the Class predominate over any questions affecting individual members.

(g) A Class action is superior to other available methods for the fair and efficient adjudication of the controversy.

6. Plaintiffs DAVID STIRLING, JR. and WILLIAM G. STIRLING, up to on or about June 29, 1972, were Officers and Directors of Stirling Homex, DAVID STIRLING, JR. holding the office of Chairman of the Board, and



WILLIAM G. STIRLING, being President thereof, up to May 1, 1972, and thereafter, Vice-Chairman of the Board.

7. Prior to March 11, 1972, and on or about February 19, 1970 and July 29, 1971, Stirling Homex did issue to the public its prospectus with respect to its common shares and its prospectus with respect to its Preferred shares. The aforesaid prospecti set forth in detail the methods of operation of Stirling Homex and its requirements with respect to working capital and cash flow.

8. Prior to the effective date of the prospectus of July 29, 1971, Stirling Homex had borrowed, on an unsecured basis, substantial sums of money from various banks, including the defendants herein, which loans aggregated upwards of \$32,000,000 and were represented by unsecured notes.

9. Thereafter, and prior to January 24, 1972, additional advances were made, or caused to be made, by the defendant banks and other co-conspirator banks, so that all of such advances aggregated approximately \$38,000,000.

10. Thereafter, Stirling Homex, by its duly designated Officers and Executives, entered into negotiations with the defendant banks and other co-conspirator banks which were represented by the individual defendants and others, not herein named, to effect a line of borrowing by Stirling Homex and its wholly-owned subsidiary, U. S. Shelter Corporation, of up to \$55,000,000.

11. Said negotiations were entered into in good faith by Stirling Homex and its Officers and Executives, fully believing that the defendants and other co-conspirators

intended to effect the foregoing line of advances, up to \$55,000,000, to enable Stirling Homex to meet its working capital requirements and necessary cash flow, since the business of Stirling Homex was expanding most rapidly and the aggregate volume thereof would be upwards of \$100,000,000.

12. The defendants and other co-conspirators conspired and agreed among themselves and adopted a plan and scheme whereby they would represent to Stirling Homex and its Officers and Executives that the said co-conspirators would meet the requirements of working capital and cash flow, up to \$55,000,000, as heretofore alleged, but in truth and in fact, the said co-conspirators, while so representing to the plaintiffs, as Officers and Executives of Stirling Homex, the foregoing, had no intention of so doing, but to the contrary, sought through the vehicle of a purported "Revolving Credit Agreement," to elevate themselves from the position of unsecured creditors to that of secured creditors, to the disadvantage of other unsecured general creditors and to the disadvantage of the stockholders of Stirling Homex, both common and Preferred.

AS AND FOR A FIRST CAUSE OF ACTION:

13. Prior to January 24, 1972, in pursuance of, and in order to effectuate the said plan and scheme, as heretofore alleged, defendants, and other co-conspirators, conspired to induce Stirling Homex and the plaintiffs, as Executive Officers of Stirling Homex, to enter into apparent negotiations, whereby the defendants and other co-conspirators promised, represented and committed themselves to make, or cause to be made, loans and advances up to



\$55,000,000 and in consideration of such promises, representations and commitments, Stirling Homex and the plaintiffs were to execute undated Financial Statements for the purpose of transforming the defendant banks' and other co-conspirator banks' unsecured debt into a secured debt under an apparent lien in favor of the said co-conspirator banks.

14. Said promises, representations and commitments were false and fraudulent, in that said defendant banks, at no time, and particularly at the time of the making thereof, intended to adhere to or to perform the said promises, representations and commitments.

15. The aforesaid undated Financial Statements were intended by plaintiffs to be made and filed contemporaneously with the Revolving Credit Agreement providing for the aforementioned advances up to \$55,000,000, becoming binding and effective.

16. Contrary to the aforementioned promises, representations and commitments, the defendant banks along with other co-conspirators caused the said Financial Statements to be filed on or about February 22, 1972 and on March 8, 1972, at a time when the aforementioned Revolving Credit Agreement had not come into effective existence.

17. Said filings were insisted upon and accomplished by the aforesaid conspirators for the reason that it was in their interest and benefit, to the disadvantage of other unsecured general creditors and of stockholders, to preserve the purported lien possessed by the defendant banks, and other co-conspirator banks, by reason of the passage of four (4) months from the date

of said filings, which passage of time, in the opinion of said conspirators, was necessary to immunize said purported lien from invalidity under Section 67 of the Bankruptcy Act.

18. The Revolving Credit Agreement did not become effective under its terms, until the end of March, 1972, or later, and by reason thereof, the said purported lien, as manifested by the aforementioned filings, and as asserted by the defendant banks, is and was void, apart from being invalid by reason of the fraudulent representations, promises and commitments heretofore alleged.

19. In furtherance of the aforementioned scheme and plan, and as part thereof to effect a preferred and secured lien with respect to the assets of Stirling Homex, and in order to enable the conspirators to effect the passage of four (4) months from the apparent date and filing of said Financial Statements, the defendants and their co-conspirators did falsely and fraudulently represent to the plaintiffs that if Stirling Homex and its Board of Directors would elevate a person designated by said defendants, and their co-conspirators, to a position of executive authority and competence, that they would forebear from calling their loans and would advance to Stirling Homex additional sums required by it for working capital so as to enable Stirling Homex to continue operations up to that point of time when it would receive payment of monies due to it from various governmental agencies, authorities and other customers.

20. In reliance upon the aforementioned fraudulent warranties and misrepresentations, the plaintiff William G. Stirling elected to resign as President of Stirling Homex and,



in his place and stead, the office of President was filled by a person designated and approved by the defendants and their co-conspirators.

21. Contrary to, and in breach of, the aforementioned warranties and representations, the defendants, along with other co-conspirators, after obtaining the resignation of plaintiff William G. Stirling, as aforesaid, declined and refused to advance the additional sums which they had represented, committed and warranted they would advance to Stirling Homex.

22. But for the aforementioned warranties and representations, plaintiff William G. Stirling would not have resigned as President of Stirling Homex.

23. Thereafter, and on or about June 28, 1972, and at a time when Stirling Homex was entitled to receive imminently upwards of \$3,200,000 as a tax refund, of which the defendants and the other co-conspirators well knew, and with respect to which, on the receipt thereof, Stirling Homex would be able to carry on and continue its business, the defendants and their co-conspirators, in furtherance of the aforementioned scheme and plan, and as part thereof, did fraudulently warrant and represent to the plaintiffs that, if plaintiff David Stirling, Jr. would resign as Chairman of the Board of Directors of Stirling Homex, and plaintiff William G. Stirling would resign as Vice-Chairman of the Board of Directors of said corporation, they would forbear from calling their loans and would advance the additional sums necessary for Stirling Homex to have working capital to carry on its business.

24. In reliance upon the aforementioned warranties and representations, and only by reason thereof, the above-named plaintiffs did resign their respective officerships in Stirling Homex, on June 28, 1972.

25. Despite the warranties and representations, and in breach of their promises, on and after the receipt of said resignations, the defendants and their co-conspirators declined and refused to advance any additional sums to enable Stirling Homex to carry on its business.

26. Thereafter, and upon the following day, June 29, 1972, the defendants and their co-conspirators did further promise and warrant that if the aforementioned plaintiffs, David Stirling, Jr. and William G. Stirling, would resign not only their officerships, as aforesaid, but also as Directors of Stirling Homex, and if Harold M. Yanowitch would resign his officership and as Director of Stirling Homex, they would forebear from calling their loans and would advance additional sums to enable the business of Stirling Homex to continue.

27. The plaintiffs solely in reliance upon the aforementioned warranties and representations did resign on June 29, 1972, as Directors of the Corporation and Harold M. Yanowitch did resign as an Officer and Director on said day solely in reliance upon the aforementioned warranties and representations. But, nevertheless, the defendants and their co-conspirators declined and refused to advance any monies despite the fact that the said plaintiffs and Harold M. Yanowitch did resign pursuant to their request so to do, in consideration of their promises to forebear from calling their loans and to advance additional working capital.



28. The aforementioned warranties and representations, at the time of the making thereof, were false and fraudulent, in that the defendants and their co-conspirators, at no time and more particularly, at the time of the making thereof, had any intention of performing the said promises and warranties, to advance additional working capital to Stirling Homex. But, to the contrary, they used the said warranties and representations as the vehicle for obtaining control of Stirling Homex, and to cause a period of four (4) months to expire so that their purported preferred and secured position as lienor creditors could not be attacked in an insolvency proceeding, which they were planning to cause or institute against or to be undertaken by Stirling Homex.

29. Contrary to all of the foregoing, not only did the defendants and their co-conspirators decline and refuse to advance the additional working capital as they had warranted and represented they would do, but they did, within one (1) week after receiving the said resignations, call all of the outstanding loans and force Stirling Homex into bankruptcy proceedings; representatives of the Company communicated with the defendants and other co-conspirators and advised them of their intention to file under Chapter XI of the Bankruptcy Law but they advised such representatives that if they filed under Chapter X instead, additional working capital would be loaned promptly to the Trustee. Said representation was relied upon and proceedings were filed under Chapter X according to said representation. The defendants and other co-conspirators did not promptly loan such additional working capital and had not intended to do so promptly at the time such representation was made.

30. The foregoing call of said loans was made by the defendants and their co-conspirators as part of the plan and conspiracy to perfect their preferred position as lienors upon the assets of Stirling Homex, which assets they had valued as being upwards of \$100,000,000, and the said conspirators effected their said plan and scheme and accomplished the same in callous disregard of the warranties and representations fraudulently and falsely made by them and in disregard of the rights of general unsecured creditors and of the plaintiffs and others similarly situated as stockholders of Stirling Homex, and in violation of the provisions of the Bankruptcy Act of the United States, prohibiting transfers in fraud of creditors and others.

31. In furtherance of said fraudulent plan and scheme, and in further aggravation thereof, the defendant CHEMICAL BANK, for itself and as agent for other co-conspirators, through the defendants BEATTY, IRISH and PRIMA, along with still other co-conspirators acting in their own behalf, on or about July 5, 1972, induced, warranted and promised to a valued customer of Stirling Homex, which customer at such time had due and owing to Stirling Homex approximately \$1,200,000, that if said customer would immediately pay to Stirling Homex the sum of approximately \$300,000, to be deposited in an account maintained by Stirling Homex with the defendant CHEMICAL BANK, they, the conspirators, would advance an equal amount of approximately \$300,000 or more, so that said \$600,000 or more could and would be immediately available to Stirling Homex in the continuing conduct of its business.

32. Said representation was relied upon by Stirling



33. The aforesaid representation and promise by the defendant CHEMICAL BANK and the other co-conspirators was false and fraudulent when made in that the said defendant CHEMICAL BANK, its employees, the defendants BEATTY, IRISH and PRIMA, as well as the other co-conspirators, had no intention whatsoever at the time of the making of the said representation and promise to advance to Stirling Homex said matching \$300,000.

34. To the contrary, and after said valued customer did make the aforesaid payment of \$300,000, which was deposited in the account of Stirling Homex at the defendant CHEMICAL BANK, the said defendant CHEMICAL BANK, for itself and as agent, through defendants BEATTY, IRISH and PRIMA, together with the other conspirators, with intentional and brazen deception, refused and failed to advance the matching \$300,000, but, upon the occasion of the forced insolvency of Stirling Homex, seized said \$300,000 so deposited by the aforesaid valued customer and applied all of the same to their own use and benefit.

35. By reason of the malevolent misrepresentations and falsehoods of the defendants and their co-conspirators and their employees and associates, which misrepresentations were made in their own selfish interests, Stirling Homex was destroyed and ruined at a time in its comparatively short business life when its prospects for profits were the brightest and its potential of becoming one of the leading and important suppliers of urgently needed housing could have been realized had the defendants performed their promises and commitments as so made by them.

36. Further, by reason of all of the foregoing, not only were the plaintiffs deprived of the benefits and privileges of the respective offices which they theretofore

had held, but they, as stockholders, together with all other stockholders, both preferred and common, were cast into a position where, upon distribution of any of the assets of Stirling Homex, the defendant banks and their co-conspirator banks would realize payment in full to themselves, first, before any monies or other assets would be available for the benefit of the general unsecured creditors or for the stockholders of Stirling Homex.

AS AND FOR A SECOND CAUSE  
OF ACTION:

37. Prior to January 24, 1972, the defendant banks and other co-conspirator banks were unsecured creditors of Stirling Homex in an amount upwards of \$38,000,000 and, at said time, they knew that a prospectus setting forth an offering by Stirling Homex of an issue of preferred stock, reported to the public, at page 9 thereof, that Stirling Homex had begun negotiations to effect a Revolving Credit Agreement for working capital purposes and thereby obtain loans to itself and to its wholly-owned subsidiary, U. S. Shelter Corporation, up to \$55,000,000.

38. Thereafter, and on or about the end of March or the beginning of April 1972, the defendant banks, and other co-conspirators, having advanced no further loans to Stirling Homex, the Revolving Credit Agreement referred to in the aforementioned prospectus first became effective, even though on its face it allegedly came into existence as of January 24, 1972, and even though prior to the end of March or beginning of April 1972, the said defendant banks and other co-conspirators filed or caused to be filed



from unsecured creditors to secured creditors possessed of a lien or liens upon all of the assets of Stirling Homex.

39. On or about April 15, 1972, the defendant banks, and co-conspirator banks, by reason of their purported claim as effective secured creditors, under the Revolving Credit Agreement, gave their permission to the payment by Stirling Homex of a dividend to holders of its preferred stock because pursuant to the terms of the Revolving Credit Agreement the defendant banks, and other co-conspirator banks, were possessed of the sole and exclusive right to dictate whether there would be a payment of dividends to holders of the preferred stock, and they did, as part of their plan and scheme to gain control of Stirling Homex, grant such permission upon the representation that they would advance and supply necessary working capital under said Revolving Credit Agreement to make up for the cash depletion by reason of said payment of dividends upon the preferred stock. Contrary to the foregoing representations to advance and supply such necessary working capital, the defendant banks and their co-conspirators in truth and in fact intended not to advance and did not advance such necessary working capital but intended to cause and did cause a restriction of the working capital of Stirling Homex as a further device to gain control of the Company.

40. Thereafter, on or about April 15, 1972, in furtherance of their plan to gain control of Stirling Homex, the defendant banks and their co-conspirators demanded of the plaintiffs that the plaintiffs acquiesce to a pledge of all of their unencumbered common stock of Stirling Homex as security for the loans previously advanced

by them in the approximate sum of \$38,000,000 and as further security for additional advances up to \$55,000,000 under the Revolving Credit Agreement and in compliance with said demand, the plaintiffs expressed their willingness to pledge all of their unencumbered common stock which had a value of upwards of \$65,000,000 at April 15, 1972 provided, however, that the said defendant banks and their co-conspirators would not call their loans and would advance the additional sums required under the Revolving Credit Agreement.

41. The defendant banks and their co-conspirators thereupon acknowledged to the plaintiffs that they would not call said loans and would advance such additional sums in the circumstances hereinbefore alleged in paragraph 40. However, said acknowledgment was false and fraudulent when made in that they, at the time of the making thereof, never intended to refrain from calling their loans or to advance to Stirling Homex additional sums up to \$55,000,000 but, to the contrary, used and practiced the above artifices in furtherance of their plan to gain and usurp control of Stirling Homex.

42. Thereafter, and on or about May 1, 1972, the defendant banks and their co-conspirators caused to be elected to the office of President of Stirling Homex a person approved and designated by them.

43. Thereafter, and on or about June 28 and 29, 1972, the defendants and their co-conspirators, and particularly the defendants CHEMICAL BANK, BEATTY, IRISH and PRIMA, caused and effected the resignations of top management of Stirling Homex in the persons of the plaintiff, DAVID STIRLING, JR., as Chairman of the Board, the plaintiff, WILLIAM G. STIRLING, as Vice-Chairman of the Board, and



HAROLD M. YANOWITCH as Executive Vice-President and General Counsel, and, likewise, demanded and obtained from the above-named their resignations as Directors of Stirling Homex.

44. During all of the aforesaid time and times, and while the defendants and their co-conspirators were engaged in the acts heretofore alleged, they had declined and refused to advance to Stirling Homex funds up to \$55,000,000 as they warranted, promised and committed they would do.

45. By reason of the acts of the defendants and their co-conspirators in asserting a position as secured creditors and possessors of liens upon all of the assets of Stirling Homex, and of consenting to and permitting the payment of a dividend by Stirling Homex to its preferred stockholders, and in contriving to compel plaintiffs to pledge all of their unencumbered common stock of Stirling Homex, and in designating and approving a person to take over the office of President of Stirling Homex, and by causing and effecting the resignations and removal of top management of Stirling Homex, the said defendants and their co-conspirators, in truth and in fact, from on or about the end of March, 1972, became control persons as the same is defined under the Securities Acts of the United States, and thereby had all the obligations of disclosure as the same is required under §17(a) of the Securities Act of 1933, as amended, and §10(b) of the Securities Exchange Act of 1934, and the rules and regulations promulgated thereunder.

46. The said defendants and their co-conspirators, as such control persons, did fraudulently and falsely

report that they would forbear from calling their loans and would advance additional loans up to \$55,000,000 as called for by the Revolving Credit Agreement, and as such control persons they did omit to disclose their intentions not to forbear from calling said loans and not to loan additional sums up to \$55,000,000 in accordance with the above-referred to agreements.

47. As a result of the dissemination of the false and misleading reports that they would forbear from calling their loans and would lend upwards of \$55,000,000 in accordance with a Revolving Credit Agreement and the agreement with U. S. Shelter Corporation and the failure of the defendants to make publicly known their intention to call said loans and to refuse to make such additional advances up to \$55,000,000, the market prices of the securities of Stirling Homex were artificially inflated and maintained during the period between March 11 and July 10, 1972. In ignorance of the omission by the defendant banks and other co-conspirators, to disclose their intentions not to refrain from calling their loans and not to advance additional sums up to \$55,000,000. as well as being aware of the reports alleged in Paragraph "46" hereof, the plaintiffs and other members of the Class, relying upon the integrity of the market prices during said period in retaining their shares or in purchasing or selling their shares, sustained substantial injury and damages as a result of the wrongs herein complained of.

AS AND FOR A THIRD CAUSE OF ACTION:

48. Defendants and their co-conspirators, in



addition to making the above-enumerated false, fraudulent and misleading reports, as the corporate insiders and control persons they were, failed to file the reports required of them, as such insiders and control persons, under §§13 and/or 16 of the Exchange Act.

WHEREFORE, plaintiffs demand judgment:

I. On the First Cause of Action:

- (a) \$35,000,000 to each of the plaintiffs;
- (b) Salary, at \$75,557 per annum, from June 28, 1972, to each of the plaintiffs;
- (c) To all members of the Class, damages for the wrongs complained of herein;
- (c) Punitive damages, in the sum of \$100,000,000;
- (d) A declaration, that the alleged lien of the defendant Banks is null, void and of no effect.

II. On the Second Cause of Action:

- (a) Awarding plaintiffs, and all members of the Class, damages for the wrongs complained of herein;
- (b) Awarding plaintiffs the costs and expenses of the litigation, including reasonable counsel and accounting fees; and
- (c) Granting such other and further relief as may be just.

III. On the Third Cause of Action:

- (a) Awarding plaintiffs, and all members of the Class, damages for the wrongs complained of herein;
- (b) Awarding plaintiffs the costs and expenses of the litigation, including reasonable counsel and accounting fees; and

(c) Granting such other and further relief as  
may be just.

Dated: New York, New York,  
November 30, 1972.

FELDSHUH & FRANK

by *SIDNEY FELDSHUH*

SIDNEY FELDSHUH,  
a Partner of the Firm

144 East 44th Street  
New York, New York 10017

(212) MU 7-8930



DEFENDANTS' MOTIONS TO DISMISS THE AMENDED COMPLAINT  
ARRANGED IN THE ORDER IN WHICH THE DEFENDANTS' APPEAR  
IN CAPTION

DAVID STIRLING, JR., and  
WILLIAM G. STIRLING,

Plaintiffs,

-against-

CHEMICAL BANK, individually, and  
as Agent; THE CHASE MANHATTAN  
BANK, N. A.; MARINE MIDLAND BANK -  
WESTERN; MARINE MIDLAND BANK -  
ROCHESTER; LINCOLN FIRST BANK OF  
ROCHESTER (formerly LINCOLN  
ROCHESTER TRUST COMPANY); UNION  
COMMERCE BANK, FRANK BEATTY; JOHN  
J. IRISH; PAAVO PRIMA; "RICHARD  
ROE"; "MICHAEL ROE"; "MARTIN ROE";  
"ALPHONSE ROE"; and "BILL ROE",  
(quoted names fictitious, true  
names being unknown, the parties  
intended being officers and/or  
employees of the respectively  
named defendant banks, as co-  
conspirators, along with other  
co-conspirators, not herein  
named),

Defendants.

72 Civ. 4476 DEB

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the amended complaint  
filed herein the undersigned will move this Court at Room 7,  
United States Court House, Foley Square, New York, New  
York, at 9:30 a.m. on January 15, 1973, for judgment

(a) pursuant to Rule 12(b)(6) of the Federal  
Rules of Civil Procedure dismissing for failure to  
state any claim upon which relief can be granted (i)  
the second and third counts of the amended complaint  
on the grounds that the acts complained of do not  
violate the Federal Securities Laws and plaintiffs  
have no standing under the Federal Securities Laws

ack → 2/26



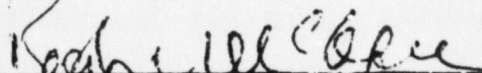
to complain of those acts and (ii) the first count on the ground that plaintiffs may not assert, as their own, the common law rights of Stirling Homex and its creditors;

(b) pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing the state law claim of the first count for lack of subject matter jurisdiction on the grounds that (i) pendent jurisdiction does not exist and (ii) exclusive jurisdiction of the prayer for a declaration that the liens of defendant Banks on the property of the debtor in reorganization are null, void and of no effect is within the reorganization court, and granting such other and further relief as to the Court may seem just and proper.

December 18, 1972

CRAVATH, SWAINE & MOORE

by

  
A member of the firm

Attorneys for Defendant  
Chemical Bank,  
One Chase Manhattan Plaza,  
New York, N. Y. 10005

To:

Feldshuh & Frank, Esqs.,  
Attorneys for Plaintiffs,  
144 East 44th Street,  
New York, N. Y. 10017

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

30a

-----x  
DAVID STIRLING, JR., and WILLIAM G. STIRLING, :

Plaintiffs, :

-against- :

CHEMICAL BANK, individually, and as  
Agent; THE CHASE MANHATTAN BANK,  
N.A.; MARINE MIDLAND BANK - WESTERN:  
MARINE MIDLAND BANK - ROCHESTER;  
LINCOLN FIRST BANK OF ROCHESTER  
(formerly LINCOLN ROCHESTER TRUST  
COMPANY); UNION COMMERCE BANK, FRANK  
BEATTY; JOHN J. IRISH; PAAVO PRIMA;  
"RICHARD ROE"; "MICHAEL ROE"; "MARTIN  
ROE"; "ALPHONSE ROE"; and "BILL ROE",  
(quoted names fictitious, true names  
being unknown, the parties intended  
being officers and/or employees of  
the respectively named defendant  
banks, as co-conspirators, along  
with other co-conspirators, not  
herein named), :

Defendants. :

NOTICE OF MOTION

72 Civ. 4476 DBB

-----x  
S I R S :

PLEASE TAKE NOTICE that upon the amended complaint filed  
herein the undersigned will move this Court at Room 129, United  
States Court House, Foley Square, New York, New York, at 9:30 A.M.  
on March 12, 1973, for judgment

(a) pursuant to Rule 12(b)(6) of the Federal Rules of  
Civil Procedure dismissing for failure to state any claim  
upon which relief can be granted (1) the second and third  
counts of the amended complaint on the grounds that the  
acts complained of do not violate the Federal Securities  
Laws and plaintiffs have no standing under the Federal



Securities Laws to complain of those acts and (ii) the first count on the ground that plaintiffs may not assert, as their own, the common law rights of Stirling Homex and its creditors;

(b) pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing the state law claim of the first count for lack of subject matter jurisdiction on the grounds that (i) pendent jurisdiction does not exist and (ii) exclusive jurisdiction of the prayer for a declaration that the liens of defendant banks on the property of the debtor in reorganization are null, void and of no effect is within the reorganization court, and granting such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.  
January 26, 1973

Yours, etc.,

MILBANK, TWEED, HADLEY & McCLOY

By Adlai S. Hardin, Jr.  
(A Member of the Firm)  
1 Chase Manhattan Plaza  
New York, N. Y. 10005  
212-422-2660  
Attorneys for Defendant  
The Chase Manhattan Bank, N.A.

TO:

FELDSHUH & FRANK, ESQS.  
144 East 44th Street  
New York, N. Y. 10017  
Attorneys for Plaintiffs

DAVID STIRLING, JR., and  
WILLIAM G. STIRLING,

Plaintiffs,

-against-

CHEMICAL BANK, individually, and as Agent;  
THE CHASE MANHATTAN BANK, N. A.;  
MARINE MIDLAND BANK - WESTERN;  
MARINE MIDLAND BANK - ROCHESTER;  
LINCOLN FIRST BANK OF ROCHESTER (formerly  
LINCOLN ROCHESTER TRUST COMPANY);  
UNION COMMERCE BANK, FRANK BEATTY;  
JOHN J. IRISH; PAAVO PRIMA; "RICHARD ROE";  
"MICHAEL ROE"; "MARTIN ROE"; "ALPHONSE ROE";  
and "BILL ROE", (quoted names fictitious,  
true names being unknown, the parties  
intended being officers and/or employees  
of the respectively named defendant banks,  
as co-conspirators, along with other  
co-conspirators, not herein named),

Defendants.

72 Civ. 4476 DBB

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the amended complaint  
filed herein the undersigned will move this Court at Room 7,  
United States Court House, Foley Square, New York, New York,  
at 9:30 A.M. on January 15, 1973, for judgment

(a) pursuant to Rule 12(b)(6) of the Federal  
Rules of Civil Procedure dismissing for failure to  
state any claim upon which relief can be granted  
(i) the second and third counts of the amended  
complaint on the grounds that the acts complained  
of do not violate the Federal Securities Laws and  
plaintiffs have no standing under the Federal



(ii) the first count on the ground that plaintiffs may not assert, as their own, the common law rights of Stirling Homex and its creditors;

(b) pursuant to Rule 12(b, (1) of the Federal Rules of Civil Procedure dismissing the state law claim of the first count for lack of subject matter jurisdiction on the grounds that (i) pendent jurisdiction does not exist and (ii) exclusive jurisdiction of the prayer for a declaration that the liens of defendant Banks on the property of the debtor in reorganization are null, void and of no effect is within the reorganization court, and granting such other and further relief as to the Court may seem just and proper.

January 4, 1973

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER  
1330 Marine Trust Building  
Buffalo, New York 14203

BLEAKLEY, PLATT, SCHMIDT, HART & FRITZ

By

*Steven C. Platt*  
A Member of the Firm  
120 Broadway  
New York, N. Y. 10005

Attorneys for Defendants  
MARINE MIDLAND BANK - WESTERN  
and  
MARINE MIDLAND BANK - ROCHESTER

TO: Feldshuh & Frank, Esqs.,  
Attorneys for Plaintiffs  
144 East 44th Street  
New York, N. Y. 10017

ORDER AND JUDGMENT OF THE DISTRICT COURT (FILE NOVEMBER 1, 1974)  
34a  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

DAVID STIRLING, Jr., and WILLIAM G.  
STIRLING,

Plaintiffs,

-against-

NOTICE OF MOTION

72 Civ. 4476 DBB

CHEMICAL BANK, individually, and as Agent; THE CHASE MANHATTAN BANK, N.A.; MARINE MIDLAND BANK - WESTERN; MARINE MIDLAND BANK - ROCHESTER; LINCOLN FIRST BANK OF ROCHESTER (formerly LINCOLN ROCHESTER TRUST COMPANY); UNION COMMERCE BANK, FRANK BEATTY; JOHN J. IRISH; PAAVO PRIMA; "RICHARD ROE"; "MICHAEL ROE"; "MARTIN ROE"; "ALPHONSE ROE"; and "BILL ROE", (quoted names fictitious, true names being unknown, the parties intended being officers and/or employees of the respectively named defendant banks, as co-conspirators, along with other co-conspirators, not herein named),

Defendants.

PLEASE TAKE NOTICE that upon the Amended Complaint filed herein, the undersigned will move this Court at Room 2703, United States Court House, Foley Square, New York, New York, at the opening of Court on June 10, 1974, for judgment:

1. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the first cause of action alleged in the Amended Complaint, for failure to state a claim upon which relief can be granted, on the ground that plaintiffs may not assert as their own claims those which, if proper, would belong only to Stirling Homex Corporation and its creditors;
2. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the second



and third causes of action alleged in the Amended Complaint, for failure to state a claim upon which relief can be granted, on the grounds that the acts complained of do not violate Federal Securities Laws and that plaintiffs have no standing under Federal Securities Laws to complain of those acts; and

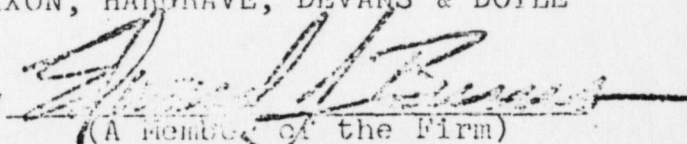
3. Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, dismissing any state law claim incorporated in the first cause of action alleged in the Amended Complaint, for lack of jurisdiction over the subject matter, on the grounds that pendent jurisdiction does not exist and that the reorganization court has exclusive jurisdiction to declare that the liens of defendant banks on the property of the debtor in reorganization are null, void and of no effect; and
4. Granting such other and further relief as may be just and proper.

Dated: Rochester, New York  
April 12, 1974

Yours, etc.

NIXON, HARGRAVE, DEVANS & DOYLE

By

  
(A member of the firm)

Attorneys for Defendant  
Lincoln First Bank of Rochester  
2200 Lincoln First Tower  
Rochester, New York 14603  
Telephone: 716-546-8000

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

36a

-----  
DAVID STIRLING, JR., and  
WILLIAM G. STIRLING,

Plaintiffs,

-against-

CHEMICAL BANK, individually, and as  
Agent; THE CHASE MANHATTAN BANK, N.A.;  
MARINE MIDLAND BANK - WESTERN;  
MARINE MIDLAND BANK - ROCHESTER;  
LINCOLN FIRST BANK OF ROCHESTER  
(formerly LINCOLN ROCHESTER TRUST  
COMPANY); UNION COMMERCE BANK; FRANK  
BEATTY; JOHN J. IRISH; PAAVO PRIMA;  
"RICHARD ROE"; "MICHAEL ROE"; "MARTIN  
ROE"; "ALPHONSE ROE"; and "BILL ROE";  
(quoted names fictitious, true names  
being unknown, the parties intended  
being officers and/or employees of  
the respectively named defendant  
banks, as co-conspirators, along  
with other co-conspirators, not  
herein named),

Defendants.  
-----

NOTICE OF  
MOTION

72 Civ. 4476 DBB

SIR:

PLEASE TAKE NOTICE that upon the amended summons  
and complaint filed herein, the undersigned will move this  
Court at Room 129, United States Courthouse, Foley Square,  
New York, New York, at 9:30 A.M. on March 12, 1973, for an  
order,

(a) pursuant to Rule 12(b)(6) of the Federal  
Rules of Civil Procedure dismissing the amended complaint  
as to defendant Union Commerce Bank on the ground that it  
fails to state a claim upon which relief can be granted,



in that (i) as to the first cause of action, plaintiffs lack standing to assert on their own behalf the common law rights of Sterling Homex Corporation and its creditors, and (ii) as to the second and third causes of action, the acts complained of do not constitute violations of § 17(a) of the Securities Act of 1933 or of §§ 10(b), 13 and 16 of the Securities and Exchange Act of 1934; and

(b) pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing the first cause of action on the further ground that the Court lacks jurisdiction over the subject matter in that (i) pendent jurisdiction over the first cause of action is not present and (ii) exclusive jurisdiction over the prayer for relief, declaring the lien of the Union Commerce Bank null and void, lies within the Reorganization Court, and for such other and further relief as the Court deems appropriate.

Dated: New York, New York  
February 12, 1973

Respectfully submitted,

DEBEVOISE, PLIMPTON, LYONS & GATES

By 

299 Park Avenue  
New York, New York 10017  
Attorneys for Defendant  
Union Commerce Bank

To: FELDSHUK & FRANK, ESQS.  
144 East 44th Street  
New York, New York  
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

38a

-----  
DAVID STIRLING, JR., and WILLIAM G. STIRLING,

Plaintiffs,

-against-

CHEMICAL BANK, individually, and as Agent; THE CHASE MANHATTAN BANK, N. A.; MARINE MIDLAND BANK - WESTERN; MARINE MIDLAND BANK - ROCHESTER; LINCOLN FIRST BANK OF ROCHESTER (formerly LINCOLN ROCHESTER TRUST COMPANY); UNION COMMERCE BANK, FRANK BEATTY; JOHN J. IRISH; PAAVO PRIMA; "RICHARD ROE"; "MICHAEL ROE"; "MARTIN ROE"; "ALPHONSE ROE"; and "BILL ROE", (quoted names fictitious, true names being unknown, the parties intended being officers and/or employees of the respectively named defendant banks, as co-conspirators, along with other co-conspirators, not herein named),

Defendants.  
-----

72 Civ. 4475 DBB

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the amended complaint filed herein the undersigned will move this Court at the United States Court House, Foley Square, New York, New York, at 9:30 a.m. on June 10, 1974, for judgment:

(a) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing for failure to state any claim upon which relief can be granted (i) the second and third counts of the amended complaint on the grounds that the acts complained of do not violate the Federal Securities Laws and plaintiffs have no standing under the Federal Securities Laws to complain of those



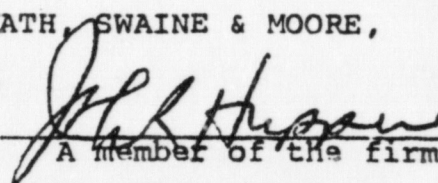
acts and (ii) the first count on the ground that plaintiffs may not assert, as their own, the common law rights of Stirling Homex and its creditors;

(b) pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing the state law claim of the first count for lack of subject matter jurisdiction on the grounds that (i) pendent jurisdiction does not exist and (ii) exclusive jurisdiction of the prayer for a declaration that the liens of defendant Banks on the property of the debtor in reorganization are null, void and of no effect is within the reorganization court, and granting such other and further relief as to the Court may seem just and proper.

April 15, 1974

CRAVATH, SWAINE & MOORE,

by

  
A member of the firm

Attorneys for Defendants  
Frank Beattie and  
John J. Irish,  
One Chase Manhattan Plaza,  
New York, N. Y. 10005

TO:

MESSRS. FELDSHUH & FRANK,  
Attorneys for Plaintiffs,  
144 East 44th Street,  
New York, N. Y. 10017

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

40a

RB

-----  
DAVID STIRLING, JR., and  
WILLIAM G. STIRLING,

Plaintiffs,

-against-

CHEMICAL BANK, individually, and  
as Agent; THE CHASE MANHATTAN  
BANK, N. A.; MARINE MIDLAND BANK -  
WESTERN; MARINE MIDLAND BANK -  
ROCHESTER; LINCOLN FIRST BANK OF  
ROCHESTER (formerly LINCOLN  
ROCHESTER TRUST COMPANY); UNION  
COMMERCE BANK, FRANK BEATTY; JOHN  
J. IRISH; PAAVO PRIMA; "RICHARD  
ROE"; "MICHAEL ROE"; "MARTIN ROE";  
"ALPHONSE ROE"; and "BILL ROE",  
(quoted names fictitious, true  
names being unknown, the parties  
intended being officers and/or  
employees of the respectively  
named defendant banks, as co-  
conspirators, along with other  
co-conspirators, not herein  
named),

Defendants.  
-----

72 Civ. 4476 DBB

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the amended complaint  
filed herein the undersigned will move this Court at Room  
129, United States Court House, Foley Square, New York,  
New York, at 9:30 a.m. on March 12, 1973, for judgment:

(a) pursuant to Rule 12(b)(6) of the Federal  
Rules of Civil Procedure dismissing for failure to  
state any claim upon which relief can be granted (i)  
the second and third counts of the amended complaint  
on the ground that the acts complained of do not  
violate the Federal Securities Laws and plaintiffs  
have no standing under the Federal Securities Laws



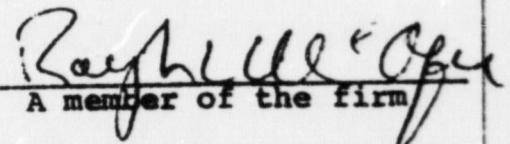
to complain of those acts and (ii) the first count on the ground that plaintiffs may not assert, as their own, the common law rights of Stirling Homex and its creditors;

(b) pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing the state law claim of the first count for lack of subject matter jurisdiction on the grounds that (i) pendent jurisdiction does not exist and (ii) exclusive jurisdiction of the prayer for a declaration that the liens of defendant Banks on the property of the debtor in reorganization are null, void and of no effect is within the reorganization court, and granting such other and further relief as to the Court may seem just and proper.

February 14, 1973

CRAVATH, SWAINE & MOORE,

by

  
A member of the firm

Attorneys for Defendant  
Paavo Prima,  
One Chase Manhattan Plaza,  
New York, N.Y. 10005

To:

Feldshuh & Frank, Esqs.,  
Attorneys for Plaintiffs,  
144 East 44th Street,  
New York, N.Y. 10017

OPINION OF THE DISTRICT COURT  
(Filed September 30, 1974)

David STIRLING, Jr., and William  
G. Stirling, Plaintiffs,

v.

CHEMICAL BANK et al., Defendants.

David STIRLING, Jr., and William  
G. Stirling, Plaintiffs,

v.

FIRST NATIONAL STATE BANK OF  
NEW JERSEY et al., Defendants.

David STIRLING, Jr., and William  
G. Stirling, Plaintiffs,

v.

FIRST NATIONAL BANK OF CHI-  
CAGO et al., Defendants.

David STIRLING, Jr., and William  
G. Stirling, Plaintiffs,

v.

UNION PLANTERS NATIONAL BANK  
et al., Defendants.

Nos. 72 Civ. 4476, 74 Civ. 64-74 Civ. 65.

United States District Court

S. D. New York.

Sept. 30, 1974.

Stockholders brought actions to recover on theories of common-law fraud, of fraud in connection with purchase or sale of security and of violation of duty to file reports under Securities Exchange Act provisions on basis of allegation that defendants had conspired to gain control of corporation and to perfect a preferred position as lienors on corporate assets by means of fraudulent representations that defendants would not call loans outstanding against corporation and would advance additional sums. On motions by defendants in certain cases to dismiss complaint and on plaintiffs' motion for leave to renew or reargue their opposition to motion of defendant in other case to dismiss complaint, or alternatively, for a certification of order dismissing such complaint, the District Court, Bonsal, J., held *inter alia*, that complaint failed to state claim on which relief could be granted for fraud in connection with purchase or sale of security or could be granted un-

der provisions imposing reporting requirements, that Court could not entertain common-law fraud claims under doctrine of pendent jurisdiction that plaintiff stockholders were not entitled to maintain common-law fraud action on certain other theory and that certain complaint stated cause of action for common-law fraud.

Ordered accordingly.

OPINION

BONSAL, District Judge.

Plaintiffs, David and William Stirling, owners of some 40% of the common stock of Stirling Homex Corporation ("Homex"),<sup>1</sup> are suing nine banks and certain officers and employees of these banks, on behalf of themselves and "all persons who owned, purchased or sold securities of Stirling Homex between March 11th, 1972 and July 10th, 1972 . . . ." By Order of the Judicial Panel on Multidistrict Litigation, filed December 21, 1973, those related actions pending outside the Southern District of New York<sup>2</sup> were transferred to this Court "for coordinated or consolidated pretrial proceedings, pursuant to 28 U.S.C. § 1407," with a related action pending here.<sup>3</sup>

1. By Order of Judge Burke of the Western District of New York dated July 12, 1972, Homex's petition for proceedings under Chapter X of the Bankruptcy Act was approved and Frank G. Raichle, Esq. was appointed Trustee.

2. a) Stirling v. First National State Bank of New Jersey, et al. (D.N.J., Civil Action No. 1957-72), S.D.N.Y. Docket No. 74 Civ. 64.

b) Stirling v. First National Bank of Chicago, et al. (N.D.Ill. Civil Action No. 72 C 3136), S.D.N.Y. Docket No. 74 Civ. 65.

c) Stirling v. Union Planters National Bank, et al. (W.D.Tenn. Civil Action No. 72-429), S.D.N.Y. Docket No. 74 Civ. 63.

3. Stirling v. Chemical Bank, et al., 72 Civ. 4476.



### Opinion of the District Court

Plaintiffs allege a conspiracy among the defendants to gain control of Homex and to perfect a preferred position as lienors upon the assets of Homex by means of fraudulent representations that the defendants would forbear from calling loans to Homex then outstanding and would advance additional sums of money.<sup>4</sup> Three causes of action are asserted. The first sounds in common law fraud. Plaintiffs allege that in return for Homex's execution of financial statements which would change the defendant banks from unsecured to secured creditors, the defendants represented that they would forbear from calling loans and would make new loans to Homex. These representations were allegedly false, and their breach, it is contended, resulted in the insolvency of Homex and the loss of value of Homex securities. Plaintiffs further allege that they resigned their positions as officers and directors of Homex in reliance on defendants' false representations that if they did so, outstanding loans would not be called and new loans would be made.

Plaintiffs' second cause of action alleges violations of section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, and section 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77q(a). Plaintiffs contend that defendants were "control persons" and as such had a duty to disclose material information; that defendants falsely represented that they would not call outstanding loans and would make additional loans to Homex and failed to disclose their intention not to forbear from calling loans and not to make additional loans; that

these misrepresentations and nondisclosures resulted in artificially inflated market prices; and that

"[i]n ignorance of the omission by the defendant banks and other co-conspirators, to disclose their intentions not to refrain from calling their loans and not to advance additional sums up to \$55,000,000 . . . the plaintiffs and other members of the Class, relying upon the integrity of the market prices during said period in retaining their shares or in purchasing or selling their shares, sustained substantial injury and damages as a result of the wrongs herein complained of."

For a third cause of action, plaintiffs allege that defendants were "corporate insiders and control persons" who were required to file reports under sections 13 and 16 of the Exchange Act, 15 U.S.C. §§ 78m and 78p, and that defendants failed to do so.

While *Stirling v. First National Bank of Chicago, et al.*, 74 Civ. 65, was still pending before Judge McGarr of the Northern District of Illinois, defendant First National Bank of Chicago moved to dismiss the complaint. Prior to the filing of the Order of the Judicial Panel on Multidistrict Litigation transferring the case to this district, Judge McGarr, by "Memorandum Opinion and Order" dated December 4, 1973 granted the motion to dismiss, except insofar as plaintiffs' first cause of action stated individual claims for common law fraud.

The defendants in the other cases now move pursuant to F.R.Civ.P. 12(b)(1) and 12(b)(6) for an order dismissing the amended complaint in *Stirling v. Chemical Bank, et al.*, 72 Civ. 4476, and the complaints in *Stirling v. First National State Bank of New Jersey, et al.*, 74 Civ. 64, and *Stirling v. Union Planters National Bank, et al.*, 74 Civ. 66, for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted. Plaintiffs move for an order pursuant to F.R.Civ. P. 6(b), 59, and 60, granting them

4. The amended complaint in *Stirling v. Chemical Bank, et al.*, and the complaints in *Stirling v. First National State Bank of New Jersey, et al.*, *Stirling v. First National Bank of Chicago, et al.*, and *Stirling v. Union Planters National Bank, et al.*, contain virtually identical factual allegations. For convenience, therefore, they are discussed in the text as a single complaint.

### Opinion of the District Court

"leave to renew or reargue their opposition to" the motion of defendant First National Bank of Chicago to dismiss the complaint, which was granted by Judge McGarr, or "alternatively, for a certification [of Judge McGarr's order] pursuant to 28 U.S.C. § 1292(b)."

*Section 10(b), Rule 10b-5, and Section 17(a)*

[1,2] To fall within the scope of section 10(b) of the Exchange Act and Rule 10b-5, the fraud alleged by plaintiffs must be "in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b); *SEC v. National Securities, Inc.*, 393 U.S. 453, 466, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969). For section 17(a) of the Securities Act to apply, fraud must be alleged "in the offer or sale of any securities." 15 U.S.C. § 77q. Generally, the courts of the Second, Third and Sixth Circuits<sup>5</sup> have held that only a purchaser or seller of a security may maintain an action for damages under section 10(b) of the Exchange Act and Rule 10b-5. See *Haberman v. Murchison*, 468 F.2d 1305 (2d Cir. 1972); *Greenstein v. Paul*, 400 F.2d 580 (2d Cir. 1968); *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956, 72 S.Ct. 1051, 96 L. Ed. 1356 (1952); *Landy v. Federal Deposit Insurance Corp.*, 486 F.2d 139 (3d Cir. 1973), cert. denied, 416 U.S. 960, 94 S.Ct. 1979, 40 L.Ed.2d 312 (U.S. 1974); *Simmons v. Wolfson*, 428 F.2d 455 (6th Cir. 1970), cert. denied, 400 U.S. 999, 91 S.Ct. 459, 27 L.Ed.2d 450 (1971); *James v. Gerber Products Co.*, 483 F.2d 944 (6th Cir. 1973). Similarly, it has been held that only a purchaser of securities may invoke the provisions of section 17(a) of the Securities Act. See *Birnbaum v. Newport Steel Corp.*, *supra*; *Slavin v. Germantown Fire Insurance Co.*, 174 F.2d 799, 807 n. 17 (3d Cir. 1949); *Berne Street Enterprises, Inc. v. American Export Isbrandtsen Co.*, [1969-1970 Transfer Binder] CCH Fed. Sec.L.Rep. ¶ 92,711 (S.D.N.Y.1970).

5. This Court must apply the substantive law of the transferor forum. In re Plumbing

Those cases which have relaxed the requirement that plaintiff be a purchaser or seller have involved a fraud in connection with an actual purchase or sale of securities which resulted in injury to the plaintiff. See *e. g.* *Eason v. General Motors Acceptance Corp.*, 490 F.2d 854 (7th Cir. 1973), cert. denied, 416 U.S. 960, 94 S.Ct. 1979, 40 L.Ed.2d 312 (U.S. 1974); *James v. Gerber Products Co.*, *supra*; *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), cert. denied, 400 U.S. 822, 91 S.Ct. 41, 27 L.Ed.2d 50 (1970); *Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d 540 (2d Cir. 1967); *Vine v. Beneficial Finance Co.*, 374 F.2d 627 (2d Cir.), cert. denied, 389 U.S. 970, 88 S.Ct. 463, 19 L.Ed.2d 460 (1967); *Heyman v. Heyman*, 356 F.Supp. 958 (S.D.N.Y.1973).

[3] In the present case, plaintiffs in essence allege only that the defendants falsely represented that they would not call outstanding loans and would advance additional monies to Homex; that plaintiffs relied on these representations and retained their Homex stock; and that the value of their Homex stock declined when the defendants' representations proved false, the loans to Homex were called, and no further monies were advanced. Not only have plaintiffs failed to allege that they are purchasers or sellers of securities, but they have also failed to allege that there was any purchase or sale of securities.

Plaintiffs argue that by letter of April 15, 1972, they expressed willingness to pledge their unencumbered Homex stock to the defendant banks in order to induce the banks to forbear from calling outstanding loans. The letter of April 15 provides:

"5. David Stirling and William G. Stirling will pledge to the Agent, as agent for the Banks, all unencumbered shares of capital stock of the Company owned by them (and all encumbered shares now owned by them which may hereafter cease to be en-

Fixtures Litigation, 342 F.Supp. 756 (J.P. M.L.1972).



### Opinion of the District Court

cumbered); such pledge to be terminated when all defaults by the Company have been cured."

Plaintiffs contend that this letter operated as a sale of securities. However, no pledge of plaintiffs' stock was ever actually made, and a mere expression of willingness to pledge stock does not constitute a sale of a security.

Plaintiffs also contend that a "Revolving Credit Agreement" entered into between Homex and the defendant banks involved the purchase or sale of securities. According to the complaint, the purpose of the "Revolving Credit Agreement" was to obtain "working capital" for Homex and its wholly-owned subsidiary, U.S. Shelter Corporation. There is nothing in the complaint to suggest that the "Revolving Credit Agreement" involved the purchase or sale of securities or was anything but an ordinary commercial loan transaction. See *McClure v. First National Bank*, 352 F.Supp. 454 (N.D.Tex.1973). Moreover, a credit agreement between Homex and the defendant banks could not confer upon plaintiffs as shareholders of Homex the status of purchaser or seller required by *Birnbaum* and progeny for standing to bring an action for damages under Rule 10b-5.

Plaintiffs having failed to allege that they are purchasers or sellers of securities or even that there was any purchase or sale of securities, the defendants' motions to dismiss the amended complaint in *Stirling v. Chemical Bank, et al.*, and the complaints in *Stirling v. First National State Bank of New Jersey, et al.* and *Stirling v. Union Planters National Bank, et al.*, are granted as to plaintiffs' second cause of action. Moreover, since plaintiffs have not alleged any purchase or sale of securities, Judge McGarr's decision in *Stirling v. First National Bank of Chicago, et al.*, 74 Civ. 65, is not affected by the Seventh Circuit's decision in *Eason v. General Motors Acceptance Corp.*, *supra*. The complaint in *Eason* alleged fraud in connection with the is-

suance of securities by a corporation in which plaintiffs were stockholders. Plaintiffs' motion for an order granting them leave to reargue or certifying Judge McGarr's order for appeal is therefore denied.

#### Sections 13 and 16

[4] Section 13(d)(1) of the Exchange Act imposes certain reporting requirements on any person who, after acquiring the "beneficial ownership" of any registered equity security, is the beneficial owner of more than 5 per cent of such securities. Plaintiffs' complaint fails to allege that the defendants either acquired or were the beneficial owners of any Homex stock. Plaintiffs contend, however, that the defendant banks acting as a group acquired the beneficial ownership of more than 5 per cent of Homex stock through the letter of April 15 in which plaintiffs expressed their willingness to pledge their unencumbered Homex stock to the defendant banks.

As pointed out earlier, there never was a pledge of stock. Moreover, voting control of stock has been held to be the only relevant element of "beneficial ownership" within the meaning of section 13(d)(1). *GAF Corp. v. Milstein*, 453 F.2d 709, 716 (2d Cir. 1971), cert. denied, 406 U.S. 910, 92 S.Ct. 1610, 31 L. Ed.2d 821 (1972); *Bath Industries, Inc. v. Blot*, 427 F.2d 97, 112 (7th Cir. 1970). Plaintiffs have not alleged that the defendants ever acquired voting control over any Homex stock. Finally, plaintiffs have alleged no injury to themselves resulting from the defendants' failure to file the reports allegedly required under section 13(d)(1). See *Washburn v. Madison Square Garden Corp.*, 340 F.Supp. 504, 508 (S.D.N.Y. 1972); *Grow Chemical Corp. v. Uran*, 316 F.Supp. 891 (S.D.N.Y. 1970). Plaintiffs have failed to state a claim under section 13(d) upon which relief can be granted.

### Opinion of the District Court

[5] Section 16(a) of the Exchange Act imposes certain reporting requirements on officers, directors and beneficial owners of more than 10 per cent of any class of any registered equity security. Plaintiffs have not alleged, however, that defendants were beneficial owners of any Homex stock, or that they were officers or directors of Homex. The letter of April 15, 1972 in which plaintiffs expressed willingness to pledge their Homex stock did not make defendants beneficial owners of Homex stock within the meaning of section 16(a). Cf. 17 C.F.R. § 240.16a-6(a) n. 2.

[6] Plaintiffs contend that when the office of President of Homex "was filled by a person designated and approved by the defendants," as alleged in the complaint, the defendants became officers of Homex within the meaning of section 16(a) through "deputization." The theory of "deputization" has been advanced in cases under section 16(b) involving "short swing" profits. See *Blau v. Lehman*, 368 U.S. 403, 82 S.Ct. 451, 7 L.Ed. 2d 403 (1962); *Feder v. Martin Marietta Corp.*, 406 F.2d 260 (2d Cir. 1969), cert. denied, 396 U.S. 1036, 90 S.Ct. 678, 24 L.Ed.2d 681 (1970). However, the concept of "deputization" has not been extended to the reporting requirements of section 16(a). Moreover, even if defendants were required to file reports under section 16(a), plaintiffs have alleged no injury to themselves resulting from defendants' failure to file. Cf. *Grow Chemical Corp. v. Uran*, *supra*.

Plaintiffs having failed to state a claim under sections 13(d) and 16(a) upon which relief can be granted, defendants' motions to dismiss the amended complaint in *Stirling v. Chemical Bank, et al.*, and the complaints in *Stirling v. First National State Bank of New Jersey, et al.* and *Stirling v. Union Planters National Bank, et al.*, are granted as to plaintiffs' third cause of action.

### Common Law Fraud

[7] Since plaintiffs have not stated any federal claims upon which relief can be granted, this Court may not entertain plaintiffs' common law fraud claims under the doctrine of pendent jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 686 (1966); *Heyman v. Heyman*, *supra*.

[8] The amended complaint in *Stirling v. Chemical Bank, et al.* asserts a basis for federal jurisdiction over plaintiffs' common law fraud claims other than pendent jurisdiction. According to the allegations of the complaint, plaintiffs are residents of New York, and the defendants appear to be citizens of New York for diversity purposes. *Union Commerce Bank*, which is a citizen of Ohio. Completely lacking is therefore jurisdiction under 28 U.S.C. § 1332. *John Birch Society v. National Broadcasting Co.*, 377 F.2d 194 (9th Cir. 1967). Clearly this case was not to be brought as a diversity action. Plaintiffs have indicated no intention of proceeding against the Union Commerce Bank in the absence of the New York defendants. See *Oppenheim v. Sterling*, 368 F.2d 516 (10th Cir. 1966), cert. denied, 386 U.S. 1011, 87 S.Ct. 1357, 18 L.Ed.2d 441 (1967), reh. denied, 388 U.S. 925, 87 S.Ct. 2127, 18 L.Ed.2d 1380 (1967), 389 U.S. 1059, 88 S.Ct. 757, 19 L.Ed.2d 861 (1968); cf. *Kerr v. Compagnie De Ultramar*, 250 F.2d 860 (2d Cir. 1958). Defendants' motions to dismiss the amended complaint in *Stirling v. Chemical Bank, et al.* are therefore granted as to plaintiffs' first cause of action, without prejudice to plaintiffs' instituting a new action against Union Commerce Bank, if they are so advised.

In the cases of *Stirling v. First National State Bank of New Jersey, et al.* and *Stirling v. Union Planters National Bank, et al.*, diversity of citizenship and an amount in controversy in excess of \$10,000 have been alleged. Jurisdiction



### Opinion of the District Court

over plaintiffs' common law fraud claims in these cases therefore exists under 28 U.S.C. § 1332. The fraud allegedly having occurred in New York, none of the parties disputes the application of New York law.

[9] Plaintiffs assert injury in their capacity as Homex shareholders and as individuals. They allege that misrepresentations made to Homex by the defendants resulted in the insolvency of Homex and the loss of value of Homex securities. Plaintiffs also allege that in reliance on the defendants' misrepresentations they resigned as officers and directors of Homex.

Insofar as plaintiffs allege injury to themselves as shareholders, in common with all other Homex shareholders, arising from misrepresentations made to Homex, they have no personal right of action. "For a shareholder to obtain a personal right of action there must be relations between him and the tort-feasor independent of those which the shareholder derives through his interest in the corporate assets and business." *Green v. Victor Talking Machine Co.*, 24 F.2d 378, 381 (2d Cir.), cert. denied, 278 U.S. 602, 49 S.Ct. 9, 73 L.Ed. 530 (1928); *see also Brody v. Chemical Bank*, 482 F.2d 1111 (2d Cir.), cert. denied, 414 U.S. 1104, 94 S.Ct. 737, 38 L.Ed.2d 559 (1973); *Niles v. New York Central and Hudson River R.R. Co.*, 176 N.Y. 119, 68 N.E. 142 (1903).

[10] Plaintiffs argue that their expression of willingness to pledge their Homex stock, contained in their letter of April 15, 1972, created a relationship between them and the defendants, independent of the relationship which they derived through their interest as shareholders in Homex. Nevertheless, no pledge of stock was ever actually made, *cf. Ritchie v. McMullen*, 79 F. 522 (6th Cir.), cert. denied, 168 U.S. 710, 18 S.Ct. 945, 42 L.Ed. 1212 (1897), and plaintiffs do not allege that they suffered any in-

jury as a result of expressing their willingness to pledge their stock.

[11] However, insofar as plaintiffs allege that they resigned their positions as officers and directors of Homex in reliance on defendants' false representations made to them as individuals, that if they did so, outstanding loans would not be called and further loans would be made, a cause of action for common law fraud may be stated. Therefore, the motions of First National State Bank of New Jersey and Union Planters National Bank to dismiss the complaints in *Stirling v. First National State Bank of New Jersey, et al.* and *Stirling v. Union Planters National Bank, et al.* are granted as to plaintiffs' first cause of action, provided that plaintiffs are given leave to file amended complaints within twenty days of the date of the order to be entered herein, setting forth their claims arising from their resignations as officers and directors of Homex in reliance on defendants' allegedly false representations made to them as individuals.

To summarize, defendants' motions to dismiss the amended complaint in *Stirling v. Chemical Bank, et al.*, and the complaints in *Stirling v. First National State Bank of New Jersey, et al.* and *Stirling v. Union Planters National Bank, et al.*, are granted. The motions of defendants First National State Bank of New Jersey and Union Planters National Bank are granted with leave to plaintiffs to file amended complaints with respect to the first cause of action within twenty days of the date of the order to be entered herein. The motion of Union Commerce Bank is granted without prejudice to plaintiffs' instituting a new action against said bank, if they are so advised. Plaintiffs' motion for an order granting them leave to reargue or certifying Judge McGarr's order for appeal is denied.

— Settle orders on notice.

ORDER AND JUDGMENT OF THE DISTRICT COURT (Filed November 8, 1974)  
 UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF NEW YORK

DAVID STIRLING, JR. and  
 WILLIAM G. STIRLING,

Plaintiffs,

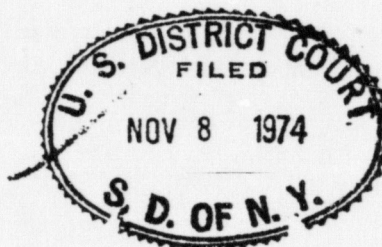
-against-

CHEMICAL BANK, individually, and  
 as Agent; THE CHASE MANHATTAN  
 BANK, N. A.; MARINE MIDLAND BANK-  
 WESTERN; MARINE MIDLAND BANK-  
 ROCHESTER; LINCOLN FIRST BANK OF  
 ROCHESTER (formerly LINCOLN  
 ROCHESTER TRUST COMPANY); UNION  
 COMMERCE BANK, FRANK BEATTY; JOHN  
 J. IRISH; PAAVO PRIMA; "RICHARD  
 ROE"; "MICHAEL ROE"; "MARTIN ROE"  
 "ALPHONSE ROE"; and "BILL ROE";  
 (quoted names fictitious, true  
 names being unknown, the parties  
 intended being officers and/or  
 employees of the respectively  
 named defendant banks, as co-  
 conspirators, along with other  
 co-conspirators, not herein  
 named),

Defendants.

72 Civ. 4476 DBB

ORDER



Defendant Chemical Bank having moved this Court for  
 judgment

(a) pursuant to Rule 12(b)(6) of the Federal  
 Rules of Civil Procedure dismissing for failure to  
 state any claim upon which relief can be granted  
 (i) the second and third counts of the amended complaint  
 on the grounds that the acts complained of do not



ONLY COPY AVAILABLE

49a

violate the Federal Securities Laws and plaintiffs have no standing under the Federal Securities Laws to complain of the acts and that the first count on the ground that plaintiffs may not assert, as their own, the common law rights of Stirling Homex and its creditors;

(b) pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing the state law claim of the first count for lack of subject matter jurisdiction on the grounds that (i) pendent jurisdiction does not exist and (ii) exclusive jurisdiction of the prayer for a declaration that the liens of defendant Banks on the property of the debtor in reorganization are null, void and of no effect is within the reorganization court; and

(c) granting such other and further relief as to the Court may seem just and proper

and after hearing counsel and after due deliberation, and upon filing the opinion of the Court, dated September 30, 1974, it is

ORDERED that the motion of defendant Chemical Bank is granted in all respects and that this action and the Amended Complaint herein, and each of the causes of action asserted therein by plaintiffs, and each of them, against Chemical Bank are dismissed with prejudice and the Clerk of this Court is directed to enter judgment accordingly;

Defendant The Chase Manhattan Bank, N. A. having moved this Court for judgment

(a) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing for failure to state any claim upon which relief can be granted (i) the second and third counts of the amended complaint on the grounds that the acts complained of do not violate the Federal Securities Laws and plaintiffs have no standing under the Federal Securities Laws to complain

of those acts and (ii) the first count on the ground that plaintiffs may not assert, as their own, the common law rights of Stirling Homex and its creditors;

(b) pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing the state law claim of the first count for lack of subject matter jurisdiction on the grounds that (i) pendent jurisdiction does not exist and (ii) exclusive jurisdiction of the prayer for a declaration that the liens of defendant Banks on the property of the debtor in reorganization are null, void and of no effect is within the reorganization court; and

(c) granting such other and further relief as to the Court may seem just and proper

and after hearing counsel and after due deliberation, and upon filing the opinion of the Court, dated September 30, 1974, it is

ORDERED that the motion of defendant The Chase Manhattan Bank, N. A. is granted in all respects and that this action and the Amended Complaint herein, and each of the causes of action asserted therein by plaintiffs, and each of them, against The Chase Manhattan Bank, N. A. are dismissed with prejudice and the Clerk of this Court is directed to enter judgment accordingly;

Defendants Marine Midland Bank-Western and Marine Midland Bank-Rochester having moved this Court for judgment

(a) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing for failure to state any claim upon which relief can be granted (i) the second and third counts of the amended complaint on the grounds that the acts complained of do not violate the Federal Securities Laws and plaintiffs have no standing under the Federal Securities Laws to



complain of those acts and (ii) the first count on the ground that plaintiffs may not assert, as their own, the common law rights of Stirling Homex and its creditors;

(b) pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing the state law claim of the first count for lack of subject matter jurisdiction on the grounds that (i) pendent jurisdiction does not exist and (ii) exclusive jurisdiction of the prayer for a declaration that the liens of defendant Banks on the property of the debtor in reorganization are null, void and of no effect is within the reorganization court; and

(c) granting such other and further relief as to the Court may seem just and proper

and after hearing counsel and after due deliberation, and upon filing the opinion of the Court, dated September 30, 1974, it is

ORDERED that the motion of defendants Marine Midland Bank-Western and Marine Midland Bank-Rochester is granted in all respects and that this action and the Amended Complaint herein, and each of the causes of action asserted therein by plaintiffs, and each of them, against Marine Midland Bank-Western and Marine Midland Bank-Rochester are dismissed with prejudice and the Clerk of this Court is directed to enter judgment accordingly;

Defendant Lincoln First Bank of Rochester having moved this Court for judgment

1. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the first cause of action alleged in the Amended Complaint, for failure to state a claim upon which relief can be granted on the ground that plaintiffs may not assert as their own claims

those which, if proper, would belong only to Stirling Homex Corporation and its creditors;

2. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the second and third causes of action alleged in the Amended Complaint, for failure to state a claim upon which relief can be granted, on the grounds that the acts complained of do not violate Federal Securities Laws and that plaintiffs have no standing under Federal Securities Laws to complain of those acts; and

3. Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, dismissing any state law claim incorporated in the first cause of action alleged in the Amended Complaint, for lack of jurisdiction over the subject matter, on the grounds that pendent jurisdiction does not exist and that the reorganization Court has exclusive jurisdiction to declare that the liens of the defendant banks on the property of the debtor in reorganization are null, void and of no effect; and

4. Granting such other and further relief as may be just and proper.

and after hearing counsel and after due deliberation and upon filing the opinion of the Court, dated September 30, 1974, it is

ORDERED that the motion of defendant Lincoln First Bank of Rochester is granted in all respects and that this action and the Amended Complaint herein, and each of the causes of action asserted therein by plaintiffs, and each of them, against Lincoln First Bank of Rochester are dismissed with prejudice and the Clerk of this Court is directed to enter judgment accordingly;

Defendants Frank Beattie (erroneously denominated Beatty in the caption), John J. Irish and Paavo Prima having



proved this Court for judgment

(a) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing for failure to state any claim upon which relief can be granted (i) the second and third counts of the amended complaint on the grounds that the acts complained of do not violate the Federal Securities Laws and plaintiffs have no standing under the Federal Securities Laws to complain of those acts and (ii) the first count on the ground that plaintiffs may not assert, as their own, the common law rights of Stirling Homex and its creditors;

(b) pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing the state law claim of the first count for lack of subject matter jurisdiction on the grounds that (i) pendent jurisdiction does not exist and (ii) exclusive jurisdiction of the prayer for a declaration that the liens of defendant Banks on the property of the debtor in reorganization are null, void and of no effect is within the reorganization court; and

(c) granting such other and further relief as to the Court may seem just and proper

and after hearing counsel and after due deliberation, and upon filing the opinion of the Court, dated September 30, 1974, it is

ORDERED that the motions of defendants Frank Beattie, John J. Irish and Paavo Prima are granted in all respects and that this action and the Amended Complaint herein and each of the causes of action asserted therein by plaintiffs, and each of them, against Frank Beattie, John J. Irish and Paavo Prima are dismissed with prejudice and the Clerk of this Court is directed to enter judgment accordingly;

And defendant Union Commerce Bank having moved this Court for judgment

(a) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the Amended Complaint as to defendant Union Commerce Bank on the ground that it fails to state a claim upon which relief can be granted, in that (i) as to the first cause of action, plaintiffs lack standing to assert on their own behalf the common law rights of Stirling Homex Corporation and its creditors, and (ii) as to the second and third causes of action, the acts complained of do not constitute violations of § 17(a) of the Securities Act of 1933 or of §§ 10(b), 13 and 16 of the Securities and Exchange Act of 1934; and

(b) pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing the first cause of action on the further ground that the Court lacks jurisdiction over the subject matter in that (i) pendent jurisdiction over the first cause of action is not present and (ii) exclusive authority over the prayer for relief, declaring the liens of the Union Commerce Bank null and void lies within the reorganization Court; and

(c) for such other and further relief as the Court deems appropriate and after hearing counsel and after due deliberation and upon filing the opinion of the court dated September 30, 1974, it is

ORDERED that the motion of defendant Union Commerce Bank is granted in all respects and that this action and the Amended Complaint herein, and each of the causes of action asserted therein by plaintiffs, and each of them, against Union Commerce Bank are dismissed with prejudice except that plaintiffs' individual claims, if any, for common law fraud, arising out of their resignations as officers and directors of Stirling Homex Corporation, as alleged in the first cause of action, are dismissed without prejudice and the Clerk of this Court is directed to enter judgment accordingly.

~~October~~ , 1974  
November 7.

*Walter B. Bal*  
\_\_\_\_\_  
U.S.D.J.

*Judgment Entered  
11-11-74  
s/ Ray*



UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DAVID STIRLING, JR. and

WILLIAM G. STIRLING,

Plaintiffs,

-against-

CHEMICAL BANK, individually, and  
 as Agent; THE CHASE MANHATTAN  
 BANK, N. A.; MARINE MIDLAND BANK-  
 WESTERN; MARINE MIDLAND BANK-  
 ROCHESTER; LINCOLN FIRST BANK OF  
 ROCHESTER (formerly LINCOLN  
 ROCHESTER TRUST COMPANY); UNION  
 COMMERCE BANK, FRANK BEATTY; JOHN  
 J. IRISH; PAAVO PRIMA; "RICHARD  
 ROE"; "MICHAEL ROE"; "MARTIN ROE"  
 "ALPHONSE ROE"; and "BILL ROE";  
 (quoted names fictitious, true  
 names being unknown, the parties  
 intended being officers and/or  
 employees of the respectively  
 named defendant banks, as co-  
 conspirators, along with other  
 co-conspirators, not herein  
 named),

72 Civ. 4476 DBB

NOTICE OF APPEAL

Defendants.

S I R S :

PLEASE TAKE NOTICE, that the plaintiffs, DAVID STIRLING

JR. and WILLIAM G. STIRLING, do hereby appeal from the

November 7, 1974 Order of the Honorable Dudley B. Bonsal

herein, filed November 8, 1974, with respect to defendants'

Rule 12 Motions to Dismiss the Complaint, and each and every

part of said Order,

Dated: New York, N.Y.  
 December 6, 1974

FELDSHUTZ &amp; FRANK

By

*Robert Bartels*  
 Robert Bartels  
 An Associate of the Firm  
 144 East 44th Street  
 New York, N.Y. 10017  
 (212) 687-8930

TO:

CRAVATH, SWAINE & MOORE  
Attorneys for Defendants Chemical Bank, Frank Beattie,  
John J. Irish and Paavo Prima  
One Chase Manhattan Plaza  
New York, New York 10005

MILBANK, TWEDD, HADLEY & McCLOY  
Attorneys for Defendants The Chase Manhattan Bank, N.A.  
and First National State Bank of New Jersey  
One Chase Manhattan Plaza  
New York, New York 10005

BLEAKLEY, PLATT, SCHMIDT, HART & FRITZ  
Attorneys for Defendants Marine Midland Bank - Western  
and Marine Midland Bank - Rochester  
120 Broadway  
New York, New York 10005

NIXON, HARGRAVE, EVANS & DOYLE  
Attorneys for Defendant Lincoln First Bank of Rochester  
3200 Lincoln First Tower  
Rochester, New York 14603

DEBEVOISE, PLIMPTON, LYONS & GATES  
Attorneys for Defendants Union Commerce Bank  
and Union Planters National Bank  
299 Park Avenue  
New York, New York 10017

TOWNLEY, UPDIKE, CARTER & RODGERS  
Attorneys for Defendant First National Bank of Chicago  
220 East 42nd Street  
New York, New York 10017



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

DAVID STIRLING, JR. et.al.,

Plaintiffs-Appellants,

against

CHEMICAL BANK, et.al.,

Defendants-Respondents.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF New York

SS.:

Eugene L. St. Louis

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at  
1235 Plane Street, Union, N.J. 07083

That upon the 21st day of March 19 75, deponent served the annexed Appendix

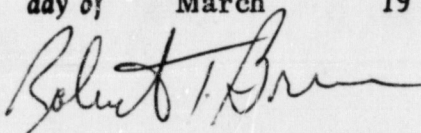
upon see attached

attorney(s) for

in this action, at see attached

the address designated by said attorney(s) for that  
purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a  
Post Office Official Depository under the exclusive care and custody of the United States Post Of-  
fice Department, within the State of New York.

Sworn to before me, this 21st  
day of March 19 75



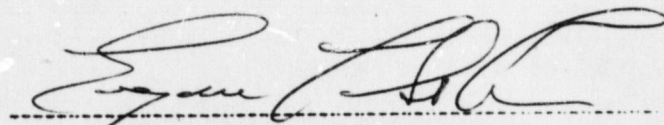
ROBERT T. BRIN

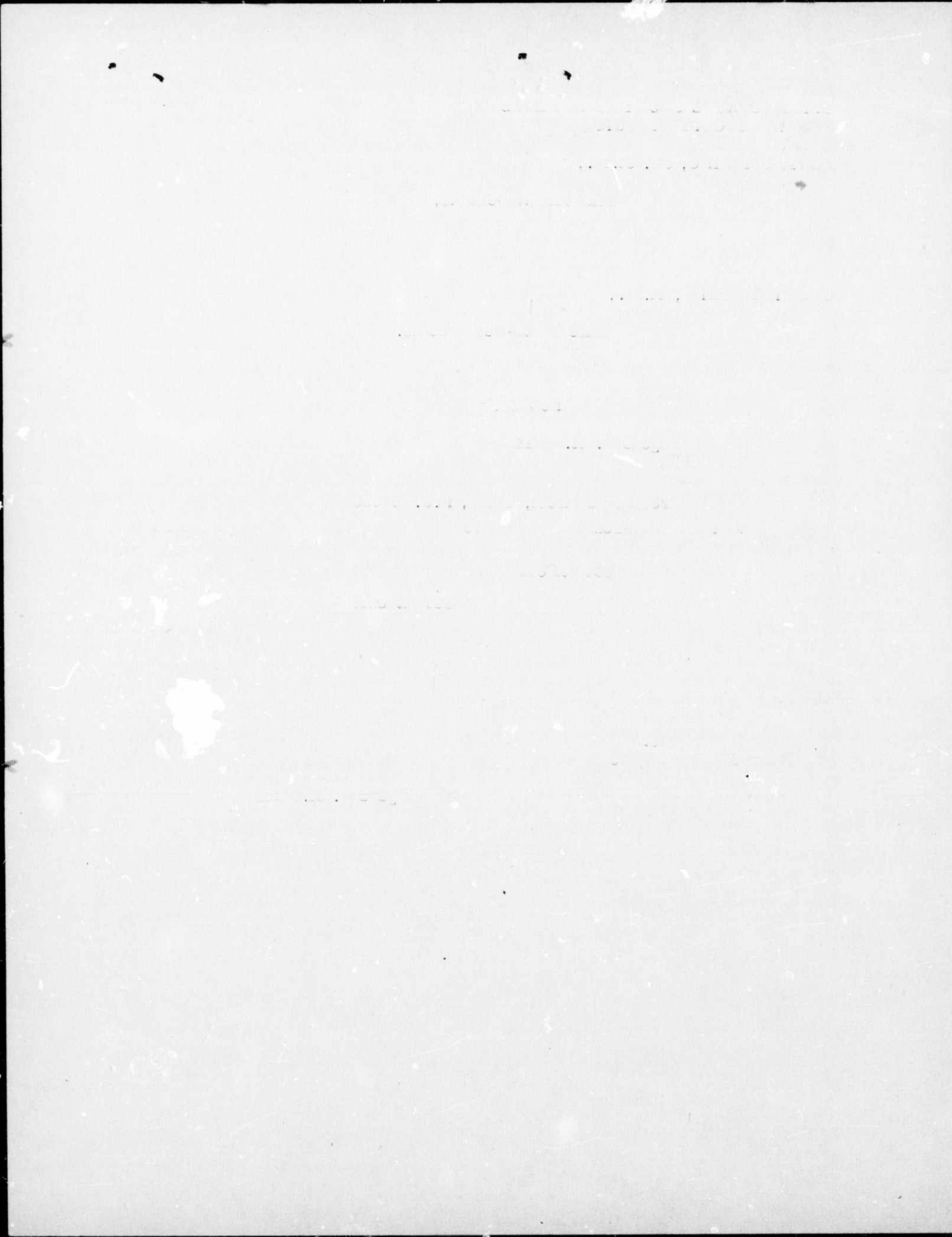
NOTARY PUBLIC, STATE OF NEW YORK

NO. 31 - 6418950

QUALIFIED IN NEW YORK COUNTY

COMMISSION EXPIRES MARCH 30, 1975

  
Print name beneath signature  
Eugene L. St. Louis





SERVICE TO

CRAVATH SWAINE & MOORE

Attorneys for Chemical Bank, Defendant-Respondent  
One Chase Manhattan Plaza  
New York, N. Y.

MILBANK TWEED HADLEY & Mc CLOY

Attorneys for Chase & First Nat. Bank of N.J.  
Defendants-Respondents  
One Chase Manhattan Plaza  
New York, N. Y.

BLEAKLY PLATT SCHMIDT & FRITZ

Attorneys for Marine Midland, Defendant-Respondent  
120 Broadway  
New York, N. Y.

DEBEVOISE PLIMPTON LYONS & GATES

Attorneys for Union Commerce and Union Planters,  
Defendants-Respondents  
299 Park Ave  
New York, N. Y.

TOWNLEY UPDIKE CARTER & ROGERS

Attorneys for Lincoln First Bank, Defendant-Respondent  
220 East 42d St  
New York, N. Y.

NIXON, HARGRAVE, DEVANS & DOYLE

Attorneys for Lincoln First Bank, Defendan-Respondent  
3200 Lincoln First Tower  
Rochester, N. Y.

